



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 1 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

RASHID SIYOI CHESHOLEI..... 1ST ACCUSED

EMMANUEL CHEBASKWONY CHEPSKOR2ND ACCUSED

JUDGMENT

The accused persons RASHID SIYOI CHESHOLEI and EMMANUEL CHEBASKWONY CHEPSKOR are faced with the offence of murder contrary to Sections 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the night of 5th and 6th of December 2008 at Grandma Hotel in Kanduyi shopping centre Bungoma County jointly with others not before court, murdered Peter Naibei Chebaskwony.

The accused pleaded not guilty and the matter proceeded to trial.

The prosecution case was that the 2nd accused and the deceased shared a land which they jointly inherited from their father. A dispute arose over maize harvested on the said land. The two were step brothers. The 2nd accused hired the 1st accused, who checked into Grandma hotel Bungoma with the deceased and in the night of 5/6 murdered the deceased. 12 prosecution witnesses testified as follows:

PW1: Isaac Makokha Khatia – He was engaged to oversee Grandma Hotel in Kanduyi. On 5.12.08 at 7.00 a.m. he was informed by the workers at the hotel that a customer had rented a room 2 days ago but left the room with lights on and had not returned the key. The room had been locked for 2 days. Together with the manager and 2 other employees they opened the door using a metal object. Inside they found a body on the bed soaked with blood. There was a note on the body that had multiple cuts. They called the police who arrived, a bag, 2 cards containing love messages, a panga that was blood stained were recovered.

PW2 Kennedy Lachana Adala. A supervisor of Grandma Hotel, recalled that while on duty on 5.12.08 at about 9 p.m. 2 customers came to the reception. They were young men aged between 20 – 25. They sought for accommodation. They booked 1 room, as they did not have money for 2 rooms. Kalenjin. They said they were brothers. He identified the 1st accused to have been one of the two men. The first accused asked for a room downstairs but did not get. The 2 went to the room later came and ordered food and left at about 10 p.m and went out of the hotel. He did not see them come back.

On 6.12.08 at about 9.a.m. a cleaner at the hotel told the witness that she could not get the key to room G

which had been sold to the 1st accused and his companion as she wanted to clean the room. The matter was reported to PW1.

PW1 directed the room he opened; inside they found a body of a man on the bed. The witness only saw the legs. The Police were called. They later removed the body to Bungoma District Hospital mortuary. While at the reception the 1st accused and the deceased had a black bag which they interchanged. The witness was able to identify the 1st accused at an identification parade.

PW3 Joseph Otiei an uncle of the deceased. He is known to both accused. 2nd accused is a nephew. On 9th December, 2008 his son Reuben Chemei informed him that the I/D card of the deceased had been recovered in Bungoma. On 10.12.05, his son and the deceased's brother told him that they had identified the body of the deceased at Bungoma District Hospital Mortuary. On 11.12.2008 seven of them went to the mortuary and identified the body. They went to the CID office in Bungoma they were shown a panga, some success card and a hand written note. 2nd accused was in the group. He looked at the hand written note and without giving the name of the author said he knew the person who wrote the note. They travelled back to Kitale however the next day as the family met to make funeral arrangements the 2nd accused nowhere was. As the family they suspected the both accused persons.

PW4 – Robin Chemengo Otiei was a friend to 1st accused and a cousin to the deceased. On 9.12.08 he learnt from the deceased brother that the deceased I/D was recovered in Bungoma. On 10th December 2008 they went to the mortuary where they were shown the body. They identified the same to be that of Peter Naibei. The police asked for their parents. On the way home 1st accused called the 2nd accused asking who had killed Peter. The two proceeded to Kitale where they sat on one table with Samuel and Emmanuel. The 1st accused joined them. They discussed the deceased – Emmanuel said he was with him on 3rd of December 2008. On 11.12.2008 they took their parents to the mortuary. They went to the police and were shown a note, a panga and 2 success cards.

While having tea was one Rose in Kitale in the company of 2nd accused, 2nd accused received several calls and each time he would take the call outside. They went for a family meeting and the 2nd accused did not turn up. At the witness then went looking for him he saw the 1st accused later he saw both accused persons and as they saw him he decided to greet them. He then saw an A.P. Land Rover and he requested the driver of the same John Kibet whom he knew to help arrest the 1st accused as he had killed someone. 1st accused was arrested. He tried to hand over his phone to 2nd accused but Kibet took it. They then went to 1st accused home and the employment card of the deceased father was found in their house. 1st accused was taken to Kitale police station and locked. 2nd accused was still with them.

On 13.12.2008 he recorded his statement. He identified the phone that was taken away from the 1st accused.

PW5 Samuel Ndiema Chepsikot a brother of the deceased. He stated that he knew the 1st accused. He was a neighbor of the deceased whereas the 2nd accused was their step – brother. The deceased visited him at his home at Kikowa on 3.11.08 at 7.00 a.m. he told him that had differed with the 2nd accused whom he stayed with in Endebes and the 2nd accused had threatened him. The deceased and 2nd accused shared a shamba of 13 acres which they inherited from their late father. They had planted maize and had harvested 340 bags. The 2nd accused took 240 bags and the deceased 100 as the 2nd accused had refused equal sharing of the bag yet they had planted together having spent equal amount of money. That, the deceased contemplated vacating the area for fear of death. They spoke again on phone on 10th November, 2008 and the deceased told him the dispute was still on. On 9.12.2008 the chief of Koibot called him and told him that his brother's ID card had been recovered in Bungoma. He called the deceased who could not be reached. He then called PW1 to inform him. They went to Bungoma police station. The police showed the body of the deceased that was lying at Bungoma District Hospital mortuary. The body had deep cuts on the neck, arm and head. The 1st accused was arrested in Kitale and the 2nd at CID office in Bungoma

In cross examination he stated that on 9.12.2008 the 2nd accused called him as he suspected him he did not speak to him he instead gave the phone to PW1. He learnt from a neighbor that the 1st accused and the deceased left home on the day the deceased died. The 1st accused carried the bag that was later found at the hotel.

PW6 Rael Cheruto – a teacher at Sankul Academy – she received a call on 12.12.08 at 3 p.m from 1st accused wife Millie who informed her that the 1st accused was being held at Kitale police station, she requested the witness to collect some items kept under the mattress. She was to pick the house keys from another neighbor. The witness informed her husband who reported the issue to A.P officers who came and accompanied them to the house. Under the bed where they removed the deceased ID and that of the father and other documents and receipt, a bank slip from Post bank, employment card of the deceased father Chebaskwony Ndiema. The police left with the documents.

PW7 Corporal Cosmas Ngubi of Ndaragwa police station. He recalled that on 12.12.2008 while attached to Kitale, crime office the 1st accused was brought by members of the public and an A.P officer. He had been arrested in Kitale town, the suspect was suspected to have been involved in the murder of one Peter Naibei. He re-arrested, booked him. Upon searching the 1st accused he found a new phone make smart phone serial number 6981. The battery had name Rashid. Later he handed him to CID Bungoma. The phone was marked MFI-10.

PW8 Corp. Patrick Ndombi, attached to Kondole Police Station in Kisumu, previously of Bungoma Police Station, recalled that on 7.12.2008 at around 7 p.m he received a call from a Mr. Makokha of Grandma Hotel in Kanduyi within Bungoma about a room hired on 5.12.2008 at 9.00 p.m had since then not been opened and he needed help. They visited the scene, saw blood coming from the floor of the room. He informed the his deputy OCS inspector Boit who came to the scene with scene of crime personnel. The door was photographed after which they forced the door open. They found a male African lying dead with cut wounds on the forehead, left hand, rear left ear, his throat cut, and his right hand small finger chopped off.

He conducted a search, found a panga stained with blood between the mattress and the bed, a small black bag, ID card of the deceased No. 24299957, a voter's card, a Christmas card addressed to Claire Mongue and a handwritten note. He took body the of the deceased to Bungoma District Hospital Mortuary.

PW9 corporal Frank Anunda of CID Bungoma was scene of crime officer. He recalled that on 7.12.2008 at 7 p.m. he accompanied Inspector Boit to scene of crime at Grandma. On arrival they found the owner and staff of the hotel. The management earlier on before calling the police forced the door open. They found a young man lying dead on the bed soaked in blood. He took pictures starting from the main door, the bed and the blood on the floor. He photographed the panga that was blood stained and a black bag next to it. The investigating officer is the one who looked inside the bag. This witness produced the pictures and a certificate dated 4.2.09.

PW10 PC. Justus Nderitu of CID, Mt. Elgon. Previously he was attached to CID Bungoma. He recalled that on 13.12.2008 at 10.00 a.m. P.C Kirimi and the witness were summoned by the DCIO and briefed of a murder case. Of a person who was murdered on 7.12.2009. They were asked to go and interview a suspect being held at Kitale. They went to Kitale Police Station met a suspect called Rashid. (1st accused). While in Kitale he received information that there was tension on the ground as 1st accused was a neighbour of the deceased. After interviewing the suspect, they decided to take him to Bungoma Police Station. But first they went to the 1st accused house in Saboti which was about 5km from the station. They found the door to the home open. They searched the house and recovered

- An ID card of Peter Naibei
- Electors card of Peter Naibei

- Employment card of John C. Ndiema
- Family bank withdrawal slip for kshs. 25,000/-
- Post bank withdrawal slip dated 8.12.08 at 10.24 another dated 7.12.08 at 16.24 hours.
- Cash sale receipt for purchase of a phone dated 7.12.08 in the name of Abdalla Rashid receipt no. 916 for kshs. 10,000/- phone was F 6980. The Phone had been bought at Malaba.
- He further testified that from the OCS Bungoma he received, a panga, success card, and a handwritten note. He the 1st accused to write similar words as the not on 4 blank papers and sent the same together with the handwritten note to a document examined in Nairobi. Later he received a report from a document confirming that all the handwritings were from the same hand. On 14.12.2008 they took the finger prints of the deceased to Registration of Persons office in Nairobi and got all his details, the deceased was identified as Peter Naibei Chebaskwony. . Blood samples of 1st accused, the panga, a shirt of the deceased soaked in blood were sent to the Government Chemist. A Report was received. He further informed the court that an identification parade was carried out at Bungoma Police Station , where the 1st accused was identified

He later arrested 2nd accused as a result of information gathered. This was on 5.12.08. He recovered a Nokia phone from 2nd accused.

PW11 Dr. Were Mbiri, a medical officer from Bungoma District Hospital produced with no objection a post mortem report of Peter Naibei Chebaskwony dated 15.12.08. The content were as follows,

- Body resting in a red shirt blood stained.
- Male African aged 28, 5ft 3 inches
- The body had the following
- Multiple head injuries
- severed Right hand small finger
- Several cuts on the neck
- Bilateral cuts on the neck on both sides of the major arteries and vein
- Penetrating cut through the skull to the brain
- cervical spine injury on the front.

OPINION – Cardio respiratory arrest due to excessive bleeding anemia hemorrhage. He produced report as exhibit. He did not receive or examine the body.

PW 12 John Siula Obonga a retired officer of police, formerly attached to Bungoma Police Station between 2005-2009. He recalled being on duty on 17.12.2008 when he was approached by PC Nderitu (PW10) to assist in recording a statement under inquiry from the 1st accused. He cautioned the accused. They were just two of them in the room and he proceed to take the statement (court rejected the statement).

At the close of the prosecution case the court found the accused with a case to answer and placed them on their defence.

The defence evidence is as follows;-

DW1 Rashid Siyoi Chesholei. He knew the deceased for two years. He knew nothing about his death. He recalled that on 5.12.2008 his father Kabarawa Hamad sent him to represent him in a meeting in Mbale Uganda. As he was preparing to leave his friend the deceased called him and informed him that he was heading to Bungoma to meet a girlfriend and the two left together. When they got to Kitale the deceased bought his girlfriend dress and charismas cards when they got to Kanduyi the friend told him that he was to meet his girlfriend at Grand ma hotel. The deceased asked him to accompany him. They went to Grandmas, and waited for the girl as they took tea. His friend decided to book a room while he left for Uganda through Malaba. On 6th he attended the meeting at Muluko district. On 7th he left Mbale for Kitale arriving in the evening. On 10th December 2008 he received a call from PW4 that Peter was dead. PW4 requested to meet him. They met in Kitale. He joined the family of the deceased in a meeting and informed him how he left the deceased. On 11th December 2008, Robert called him to meet the area chief so that they could trace the girl who was to meet with the deceased. He met him and the family were divided some thinking he was involved. He was later arrested. The same day police officers from Bungoma came for him, they took him to his house where they only recovered a receipt for a phone. The police officer beat him. He was booked at Bungoma police with other suspects including his wife Lydia Injabi. He was threatened and asked to sign a statement which he declined. He denied spending the night at Grand ma. In cross examination he having been with the deceased. He denied carrying the bag with the deceased interchangeably. He produced a bus ticket to malaba (dexh10. He stated that he did not know whether the deceased girlfriend showed up. He denied wanting to escape before arrest.

DW2 –Emmanuel Chepsikor Chebaswkony a step brother to the deceased. He received a call from PW3 at noon on 7.12.08 and was informed of the death of Peter. He met PW3 later the same day at 1 p.m. On the next day, the 8th he came to Bungoma with other relatives, visited the Police Station and the mortuary. They were told the body was decomposing and they needed to make arrangements. They came for the Post Mortem with the rest of the family. It is at this point that he was arrested while they were at the Police Station. In cross examination he denied sharing land with the deceased, cultivating land with the deceased or having had any disputes. He also denied having threatened the deceased on 3rd November 2008 and having met or received calls from 1st accused..

The issue before court for determination is whether or not the prosecution has placed sufficient evidence to prove beyond reasonable doubt that the two accused persons herein caused the death of the deceased Peter Naibei Chebaskwony on or around the 5th December, 2008.

I have considered both the prosecution and the defence evidence as summarized above and including respective submissions. On its part the state submits that the defence gave contradictory evidence concerning their arrest. That 1st accused failed to prove his alleged travel to Mbale Uganda. That PW2 connected 1st accused to the murder. 1st accused was last seen in the company of the deceased; they booked a room at Grand ma hotel 9 p.m on 5.12.08. They had a black bag that they kept interchanging, it appeared to be heavy; he was able to identify the 1st accused at the identification parade; the 1st accused was found with the deceased property; he withdrew money from the deceased account on 7th and 8th of December, 2008. That a document examiner testified that exhibit 4 was in the hand writing of the 1st accused. Therefore there was inference that none other than the 1st accused murdered the deceased.

As regards the 2nd accused the State submitted that there was contradiction in his evidence; that PW3 testified that the 2nd accused had threatened the deceased. PW11 in his investigations also established that accused NO..2 wanted to kill the deceased; that circumstantial evidence pointed at 2nd accused.

On its part the defence submitted that the prosecution had failed to directly connect the accused persons to the offence or proving that they were present when the deceased was hacked to death, or showing that they did anything for the purposes of enabling, aiding, abetting, connecting or procuring any other person to kill the deceased. That though the accused persons are facing a joint charge presupposing a

common intention to prosecute a common purpose there is no evidence that these accused person, by themselves or in conjunction with other designed and did prosecute a common intention to kill or inflict injury upon the deceased.

As regards the 2nd accused there is no evidence that he was in the company of the deceased and the 1st accused whilst at Bungoma on the evening of 5th or morning of 6th December, 2008.

That no ingredients of murder, or malice afterthought was established against the accused person; the evidence before court was that on the night of 5th December 2008 when the deceased and 1st accused were at Grand ma they looked jovial with no signs of acrimony. That although PW11 attempted to suggest bad blood between the deceased and 2nd accused this did not come out from the evidence of PW4 as alleged. That 2nd accused denied the allegation of a dispute as testified by PW5; the prosecution evidence is fraught with numerous inconsistencies and discrepancies. The same make the prosecution evidence unreliable and no believable.

In criminal cases the prosecution must prove its case beyond all reasonable doubt. This was espoused in the case of **Okale vs. Republic 1965 EA at 555** where the court stated,

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence on in counsels speeches.”

“The burden of proof in criminal proceedings is through out on the prosecution and it is the duty of the trial judge to look at the evidence as a whole.”

The defence in this case strongly submitted that there was no direct evidence linking the accused persons directly with the matter. There was indeed no eye witness. No one testified to have seen the accused person commit the offence. The state on the other hand has asked the court to draw inferences from the relation the deceased had with the 2nd accused and the fact that the 1st accused was the last person seen with the deceased.

In the case of **Kariuki Karanja vs. Republic [1986] KLR 196** the court stated thus in regard to circumstantial evidence,

“ in order for a circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt, on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”

The offence of murder is committed when one causes the death of another by some unlawful act or omission. It must also be shown that at the time of the omission or commission there was malice afterthought. Section 206 of the Penal Code states,

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances.

a). An intention to cause the death of or to do grievous harm to any person whether that person is the person who actually killed or not.

b). Knowledge that the act of omission causing death will probably cause the death of a grievous harm to a person, whether that person actually killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is

cause or not, or by a wish that it may not be cause.

c). Intent to commit a felony and an intention by the act or omission to facilitate the fight or escape from custody of any person who had committed or attempted to commit a felony.

The 1st accused in his evidence admitted to having travelled from Entebbes to Kanduyi with the deceased via Kitale. They arrived at Grand ma hotel where he says the deceased booked a room. He agrees again with the prosecution witnesses that they had tea and then left the hotel. It was his evidence that he boarded vehicle to Malaba. The prosecution witnesses did not see the deceased or the 1st accused return to the hotel.

PW2 stated that 2 men came to the hotel and booked one room as they indicated they did not have enough money to book 2 rooms. The 1st accused is one of the two men. He further stated that the 1st accused wanted a room downstairs but the same was not available. None of the two returned the key and they did not have the key for purposes of the witness to clean could clean the room prompting a report to their boss.

PW1 stated that in the room where the deceased's body was found there was a note ,a black bag inside were two cards containing love messages and a blood stained panga were recovered.

Pw6 Rael Cheruto informed the court that she received a call from the 1st accused's wife to go and pick some documents from their house, the documents had been kept under a mattress. She reported to her husband, who reported to some elders and the police were alerted. In the company of the police they went to the house and under the bed they got the following

- Ø ID of peter the deceased and that of his father.
- Ø A bank slip of post bank
- Ø Voters card of the deceased

PW10 P.C. Justus Nderitu from CID Bungoma was sent by DCIO to interrogate a suspect in Kitale who happens to be 1st accused. He was in the company of PC Karimi. They interrogated him and decided to arrest him. They took him to his house where the following items were recovered.

- Deceased ID
- Electors card of the deceased
- Employment card of John Ndiema
- Family bank withdrawal slip from deceased account for kshs. 25,000/=.
- Post bank withdrawal slip dated 8.12.2008 and 7.12.08.
- Cash receipt for a new phone.

He confirmed that although PW6 had found items this had not been reported. She informed them of the items that had been made.

A report from a hand writing expert was produced with no objection from the contained in the card and note which he did and the plain paper and the note were taken to the examiner and reprint made. Confirming that the handwriting on exhibit P4 and the documents on plain paper were from the same hand.

It is too much of a coincidence that the 1st accused was the last person seen with the deceased on the night of 5.12.08; and 2 days later the deceased is found brutally murdered; having died several hours earlier; his things are found at the home of the 1st accused including banking in slips of withdrawal after the deceased death, the 1st accused cannot give a proper account of his whereabouts between the night of the 5th of December, 2008 and the 7th when the body of the deceased was discovered; upon his arrest his wife asks PW6 to remove the incriminating documents from their home.

I find the evidence of PW6 Rael Cheronro corroborates that of PW11 who was detailed, thorough and did commendable investigations. I find the two to have been truthful and dependable witnesses. And I therefore rely on their evidence in arriving at a conclusion that the 1st accused hid the recovered items as enumerated by the two in his house.

There are a number of contradictions in the prosecution evidence including what was recovered and where however the said contradictions do not in any way erode the circumstantial evidence that irresistibly points to the 1st accused to be author of the brutal death of the deceased Peter Naibei Chebaskwony.

As for the 2nd accused he was suspected by the family to have been the initiator of the murder as he had differences with his step brother.

PW2 stated that when they visited Bungoma police on the 11th of December, 2008, together with seven family members including the 2nd accused. They were shown a panga, success cards and a hand written note and the 2nd accused looked at the note and said he could identify the handwriting. The witness equally suspected the 2nd accused was conversing with the 1st accused.

PW4 stated that on 11.12.2008 while taking tea in the company of one Rose and the 2nd accused, the 2nd accused kept receiving calls and each time he received the call he left to go out and talk. The 2nd accused failed to attend a family meeting and PW4 went looking for him and found him with 1st accused at which point PW4 caused the arrest of 1st accused.

PW5 on his part gave account of the differences the 2nd accused had with the deceased over maize harvested from a shamba both inherited. The deceased reported to him that 2nd accused had threatened his life.

PW3 & PW4 confirmed that the deceased and 1st accused lived together in Saboti despite denial by the 2nd accused

I am satisfied by the evidence of PW3, 4 & 5 who were related to the deceased and 2nd accused. Indeed PW3, PW4 & PW5 had no reason to frame the 2nd accused. I therefore believe their evidence and in particular that of PW5 that there was bad blood between the deceased and the 2nd accused over maize harvest from the land in Saboti. Further it is clear from the evidence of PW3 & 4 that while the family would be having family meetings the 2nd accused was either on phone or meeting with the 1st accused.

PW4 stated in his evidence

“I, Rose and 2nd accused were taking tea in a hotel near the bus stage. The 2nd accused received several calls. Every time he received a call he went outside to talk.”

“We then went for the meeting but Emmanuel did not come. I went looking for him near the stage. Around Vision Gate, I saw the 1st accused pass me along the street, looking back I saw the two accused person greeting one another outside Trans mattress supermarket.”

“I told him to help me arrest Rashid because he had killed someone. Rashid was arrested and

put inside the vehicle. Rashid attempted to hand over his phone to Emmanuel which Kibet snatched and kept in his pocket.”

Like the 1st accused I find that there is circumstantial evidence pointing irresistibly towards the 2nd accused to have been initiator author, and an accomplice of the 1st accused in perpetrating the murder of the deceased.

I find that the Prosecution proved its case against the two accused persons beyond any reasonable doubt, I find them guilty of the murder of the deceased Peter Naibei Chebaskwony and convict the 2 accordingly.

Dated and Delivered at Bungoma this 2nd day of October 2015

ALI-ARONI

JUDGE

In the Presence

State Counsel.....

Defence Counsel.....